Nos. 93-762 and 93-1094

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY
and JEROME B. GRUBART, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, in the absence of a substantial federal maritime interest in providing a uniform rule of decision, a federal court has admiralty jurisdiction over a tort which causes damage only to non-maritime parties.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The issue in this case—whether the federal admiralty jurisdiction extends to a traditional state law tort—is of fundamental importance to *amici*.

As the Court recognized in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Constitution "empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits." *Id.* at 360-61 (quoting *Crowell v. Benson*, 285 U.S. 22, 55 (1932)). Because a federal court, sitting in admiralty, has the power to create maritime rules of decision which displace those of the State, it is of fundamental importance to the federal-state balance that admiralty jurisdiction be limited to those situations where there is a substantial federal maritime interest in providing a uniform rule of decision.

Because of the importance of this issue to *amici* and its members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt the statement of petitioner City of Chicago.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The purpose of the Constitution's grant of the admiralty jurisdiction to the federal courts is to provide a uniform body of law where there is a substantial federal interest in protecting maritime commerce. *See American Dredging Co. v. Miller*, 114 S.Ct. 981, 987 (1994); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982). It is this fundamental purpose—the need to protect maritime commerce through the application of uniform rules—which must animate the jurisdictional inquiry. Our system of federalism requires that in the absence of such a need, federal courts must decline to exercise the admiralty jurisdiction.

The Court has long recognized that "the State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Romero*, 358 U.S. at 374 (1959). Thus, under the Commerce Clause, the Court has frequently recognized the power of the States to regulate maritime matters which are of local concern. *See, e.g., Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1882); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). Likewise, even when the Court has exercised its power under the jurisdictional grant "to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits," *Romero*, 358 U.S. at 361 (quoting *Crowell v. Benson*, 285 U.S. 22, 55 (1932)), it has repeatedly recognized the role of the States in providing rules of decision where there is no compelling need for a uniform federal rule. *See, e.g., Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955); *Madruga v. Superior Ct. of Calif.*, 346 U.S. 556 (1954); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924).

The jurisdictional inquiry in all admiralty cases should be guided by this same principle. But it is of particular

importance in a case such as this one which arises under the Admiralty Extension Act because it involves a tort which "state law has traditionally governed" and "raise[s] difficult questions concerning the extent to which state law would be displaced or preempted." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971). Accordingly, federal courts must be sure that the assertion of admiralty jurisdiction is consistent with its fundamental purpose. *See Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990); *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S.Ct. 2071, 2074-75 (1991). In determining whether admiralty jurisdiction exists in Admiralty Extension Act cases, a court should examine the complaint to identify "the conduct alleged to have caused" the tort and ask whether there is a substantial federal maritime interest in providing a uniform rule of decision for the tortious conduct at issue. *See Foremost*, 457 U.S. at 675. In the absence of such an interest, a federal court must decline to exercise the admiralty jurisdiction.

2. Great Lakes asserts that pile driving is the relevant activity for purposes of the jurisdictional inquiry and, as such, is a traditional maritime activity subject to admiralty jurisdiction. Pile driving does not implicate the need for a uniform rule of decision, however. And while Great Lakes asserts the existence of "a century of cases applying admiralty jurisdiction to the installation and repair of pilings in navigable bodies of water[,]" Opp. Cert. 12, the most these cases can be said to stand for is that vessels which engage in pile driving also engage in other functions (such as navigation and the employment of seamen) which require uniform rules of decision and thus have been traditional concerns of the admiralty courts.

In contrast to the absence of any tradition of admiralty courts hearing disputes involving damage to other structures caused by tortious pile driving, state courts have long heard disputes of this kind. *See, e.g.*, 7 Stuart M. Speiser, *et al.*, *The American Law Of Torts* § 19:16 (1990) (collecting state court cases). This common construction tort is far removed from the maritime law's traditional concern of protecting the shipping industry and traders by providing a legal system which assures that the same conduct will have similar legal consequences throughout the world. *See American Dredging*, 114 S.Ct. at 990.

The general absence of federal maritime regulation governing pile driving is further evidence that there is no substantial federal maritime interest in providing uniform rules to govern the tortious conduct at issue. The tort here thus stands in stark contrast to the vessel collision in *Foremost*, which was governed by a federal statutory enactment that required uniform administration by the federal admiralty courts. *See* 457 U.S. at 676 (citing the Rules of the Road, 33 U.S.C. §§ 2001 *et seq.*).

ARGUMENT

I. EXERCISES OF THE FEDERAL ADMIRALTY AND MARITIME JURISDICTION MUST BE GUIDED BY THE NEED TO ENFORCE UNIFORM RULES

As several commentators have noted, the framers' decision to vest in the federal courts the judicial power over "all [c]ases of admiralty and maritime [j]urisdiction," U.S. Const. art. 3, § 2, received little attention and appears to have been uncontroversial. *See* Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L. Rev. 661, 669-71 (1963) (*Erie At Sea*); Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 Cornell L. Q. 460 (1925); Wright, *Uniformity In The Maritime Law Of The United States*, 73 Penn. L. Rev. 123, 128 (1925) (*Uniformity In The Maritime Law*). Perhaps the best explanation for why this was so is that at the time of the Convention, there was already in existence "the traditional body of rules, precepts and practices known . . . as the maritime law," 1 Steven F. Friedell, *Benedict on Admiralty* § 104 (7th ed. 1993), which, while "more or less incomplete and imperfect, no doubt,

and with variations from place to place, . . . prevail[ed] generally throughout the civilized maritime world, more striking in its similarities than in its local differences, and at all events much more uniform than the purely local law of the countries enforcing it." *Uniformity In The Maritime Law*, 73 Penn. L. Rev. at 127.

The maritime law "follow[ed] the trader, br[inging] about like legal consequences . . . wherever he might go and into whatever commercial court he might be drawn, willingly or unwillingly." *Id.* It was thus recognized as being "not the law of a particular country, but the general law of nations," *Luke v. Lyde*, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617-18 (K.B. 1759) (opinion of Lord Mansfield, C.J.); its international scope required uniformity in application. *See Uniformity In The Maritime Law*, 73 Penn. L. Rev. at 127; Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 Supreme Ct. Rev. 158, 163-64 (*Federalism and the Admiralty*) (noting that the existence of the general maritime law "served to minimize any state objections to national power in this field; and because of the innumerable contacts with foreign interests, unequalled in land transactions, the preservation of harmony between our law of the sea and those of other nations was a strong desideratum").

While the framers' decision to grant the federal courts the admiralty and maritime jurisdiction prompted little debate, it seems clear that this was because the maritime law was understood as being part of the law of nations. As such, the maritime law required uniformity in its application. As Professor Stolz has noted, "Hamilton, Madison, Randolph, and Wilson all spoke in terms of the impact on foreigners and the necessity of a uniform system of law." *Erie at Sea*, 51 Cal. L. Rev. at 670 (footnotes omitted).

For example, in The Federalist No. 80, Hamilton wrote:

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend upon the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[2]

Id. at 447 (Isaac Kramnick ed., 1987). Madison, in discussing the various jurisdictional grants contained in Article III, stated:

> If, in any case, uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can alone secure uniformity. . . . To the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can only be done by giving the federal judiciary exclusive jurisdiction. Controversies affecting the interest of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals.

3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (2d ed. 1907). Wilson likewise recognized that "the admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, [and] to a scene in which controversies with foreigners would be most likely to happen." 1 Max Farrand, *The Records of the Federal Convention of 1787* 124 (1966).

The contemporaneous statements of the framers thus demonstrate that the purpose of federal admiralty juris-

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[2] "The 'public peace' was a reference back to Hamilton's earlier statement 'that the peace of the WHOLE ought not to be left at the disposal of a PART.'" *Erie at Sea*, 51 Cal. L. Rev. at 670 n.39 (quoting Alexander Hamilton, *The Federalist* No. 80 at 446 (Isaac Kramnick ed., 1987)).

diction "was the protection of merchants, notably foreign traders, by having a uniform law administered by the federal courts." *Erie at Sea*, 51 Cal. L. Rev. at 670; *see also Federalism and the Admiralty*, 1960 Supreme Ct. Rev. at 163-64; 1 *Benedict on Admiralty* § 105.[3] To be sure,

[3] *Amici* note that a recent scholarly commentary criticizes many leading authorities for interpreting the jurisdictional grant based on a paradigm of private litigation when the framers considered such matters unimportant. *See* Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117, 118, 138 & n.110 (1993). Professor Casto argues that the framers' principal concern was to provide courts competent to adjudicate such matters of sovereign interest as prize cases, crimes committed on the high seas, and revenue cases, not to adjudicate private disputes. *Id.* Indeed, it is quite significant that when, in 1790, Congress asked Attorney General Edmund Randolph (a former governor of Virginia and judge on that State's admiralty court) to conduct a study of the federal judiciary, Randolph reported that "a federal forum for the resolution of private maritime disputes was not needed because 'in [these cases], the State Legislature may establish a jurisdiction reaching the vessel itself.'" *Id.* at 121 (quoting H.R. Rep. 1st Cong., 3d Sess. (Dec. 31, 1790), *reprinted in* 1 *Am. State Papers: Miscellaneous* 21 (W. Lowrie & W. Franklin eds. 1834)). According to Casto, Randolph's view that the existence of federal admiralty jurisdiction is dependent not upon "the nature of the remedy" sought but "the substance of the underlying dispute," *id.* at 122, was the accepted understanding of the "Founding Generation." *See id.* at 122-44. The structure of the Judiciary Act of 1789, 1 Stat. 73, manifests the framers' understanding that private maritime disputes were not significant to federal interests by vesting exclusive jurisdiction over prize, criminal and revenue cases in the federal courts while "saving to suitors" the right to bring private suits in the state courts. *Id.* at 144.

Subsequent events have, of course, led the Court to view Article III's jurisdictional grant as conferring on the federal courts the power to engage in "federal common lawmaking in admiralty" to preserve the uniformity of maritime law in disputes involving private interests. *American Dredging*, 114 S.Ct. at 989; *see also Romero*, 358 U.S. at 374. Nonetheless, Professor Casto's analysis counsels for a restrained approach in determining whether the federal admiralty jurisdiction should be exercised. *Cf. American Dredging Co.*, 114 S.Ct. at 992 (Stevens, J., concurring).

the need for a uniform body of maritime law is not limited to those disputes which arise out of the foreign trade but arises wherever there is a national interest in protecting maritime commerce by applying uniform rules. *See, e.g., Foremost*, 457 U.S. at 674-77. This fundamental purpose—the need to apply uniform federal rules—must animate the inquiry into whether federal courts should exercise admiralty jurisdiction.

As the Court has recognized, the "[m]aritime law is not a monistic system" which always requires the application of uniform federal rules. *Romero*, 358 U.S. at 374. To the contrary, "[t]he State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Id.; see also Huron Portland Cement*, 362 U.S. at 442 ("[T]he states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.").

The First Congress, for example, recognized that maritime pilotage was not the type of subject matter requiring uniform federal rules but was a local concern which was properly the subject of state regulation. *See* Act of Aug. 7, 1789, ch. 9, § 4, 1 Stat. 54. And the Court recognized as much in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852), when it rejected a challenge to this scheme:

> [T]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

The state compulsory pilotage statute at issue in *Cooley* was, of course, expressly authorized by Congress. Nonetheless, even in the absence of Congressional authoriza-

tion, the Court has frequently upheld the power of the States and local governments to regulate maritime matters which are of local concern. *See, e.g., Kelly v. Washington*, 302 U.S. 1, 14-16 (1937); *Morgan's Steamship Co. v. Louisiana Bd. of Health*, 118 U.S. 455, 465 (1886); *Packet Co.*, 105 U.S. at 562-63.

For example, in *Packet Co.*, the Court upheld a municipal regulation designating the proper area for steamboat landings. 105 U.S. at 562-64. While acknowledging that the regulation "may seriously affect [vessels] in their business of navigation and transportation," the Court also recognized that "[t]he protection of the shore of the sea or bank of a river on which a town is situated is a necessity to the town, and the washing and crumbling of the bank from the agitation of the waters, made by the landing of large steamers, demand that such regulations should exist." 105 U.S. at 562. The Court thus characterized the regulation as "belong[ing] . . . manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing-places, can be properly made." *Id.* at 563.

In *Morgan's Steamship*, the Court rejected a challenge to Louisiana's quarantine laws which were designed to protect the State, and more particularly, the City of New Orleans, from the spread of contagious diseases, despite the regulatory scheme's potential for disruption of maritime commerce. 118 U.S. at 458-59, 463-64. Analogizing the scheme to pilotage laws, the Court held:

> The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York.

Id. at 465.

And in *Kelly*, the Court upheld a state regulation of the safety and seaworthiness of motor tugboats. 302 U.S. at 14-16. The Court rejected, *inter alia*, a challenge to the scheme on the ground that the subject required uniform federal rules and thus could only be regulated by Congress. *Id.* at 14-15. In so holding, the Court noted that "[a] vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of th[is] principle" of uniformity. *Id.* at 15. *See also Huron Portland Cement*, 362 U.S. at 445-46 (upholding municipal regulation of vessel emissions, in part because matter was a local concern).

To be sure, these cases generally involved challenges to state and local regulation of maritime activity brought under the Commerce Clause. But even when the Court has exercised its power under the jurisdictional grant "to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits," *Romero*, 358 U.S. at 360-61 (quoting *Crowell*, 285 U.S. at 55), it has repeatedly recognized the right of the States to provide rules of decision where there is no compelling need for a uniform federal rule. As the Court explained in *Romero*:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when

> this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.

358 U.S. at 373 (footnote omitted).

The Court has thus upheld, *inter alia*, the enforcement of state-created liens, *see Vancouver S.S. Co., Ltd. v. Rice*, 288 U.S. 445 (1933); state wrongful death and survival of action statutes (despite the historic unavailability of such relief in admiralty), *see Just v. Chambers*, 312 U.S. 383 (1941), *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); state laws providing for the partitioning and sale of a vessel, *Madruga*, 346 U.S. 556; state laws authorizing state courts to direct specific performance of arbitration agreements in maritime contracts, *Red Cross Line*, 264 U.S. 109; and state laws regulating the terms and conditions of marine insurance contracts. *Wilburn Boat Co.*, 348 U.S. 310. As the Court noted in *Romero*, "all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity." 358 U.S. at 373-74. *See also Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337-44 (1973) (upholding state law imposing strict liability on vessels for damages and clean-up costs caused by oil spills).

The issue in these cases was what substantive law—state or federal maritime—to apply and not what forum was proper to hear the dispute.[4] But of the various grants contained in the allocation of the admiralty and maritime jurisdiction to the federal government, certainly the one with the greatest potential for disruption of the federal-state balance was that which "empowered the federal

[4] Several of these cases were not even brought in the federal admiralty jurisdiction. *See, e.g., Wilburn Boat Co.*, 348 U.S. at 311 (proceeding brought in state court and removed to federal court because of diversity of citizenship); *Madruga*, 346 U.S. at 557 (proceeding brought in state court); *Red Cross Line*, 264 U.S. at 119 (same).

> courts in their exercise of the admiralty and maritime jurisdiction . . . to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits." *Romero*, 358 U.S. at 360-61 (quoting *Crowell*, 285 U.S. at 55).[5]

If the Court, in the exercise of this weighty power, has historically recognized that it is not free to displace state law in the absence of a substantial federal interest in applying uniform rules, then surely the threshold question of whether a federal court may properly exercise the admiralty jurisdiction should be guided by the same principle. As the Court noted in *Romero*, "[h]ere, as is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy." 358 U.S. at 374-75.

Accordingly, in the absence of a substantial federal interest in applying uniform rules of maritime law, federal courts should decline to exercise the admiralty jurisdiction. As a leading commentator has stated:

> Although the lines are not always easy to draw, it would likely lead to more satisfactory results if courts recognized that the purpose of having jurisdiction over maritime affairs is to provide a forum for de-

[5] As the Court recognized in *Romero*:

> Article III impliedly contained three grants. (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction" and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

358 U.S. at 360-61 (quoting *Crowell*, 285 U.S. at 55).

veloping a uniform body of law for those aspects of maritime commerce for which there is a substantial federal interest.

1 *Benedict* at § 103; *see also* Black, *Admiralty Jurisdiction: Critique And Suggestions*, 50 Colum. L. Rev. 259, 273 (1950).[6] Not only is such an approach consistent with the framers' understanding of the purpose of the admiralty jurisdiction, *see supra* pp. 6-7, *amici* respectfully submit that our system of federalism requires no less.

The Court, in assessing the precise boundaries of federal admiralty jurisdiction, has generally recognized as much. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), the Court refused to allow a longshoreman to sue in admiralty for an injury incurred while working on a dock. In so holding, the Court stated:

> We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or preempted, and would furnish opportunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts. As the Court declared in *Healy v. Ratta*, 292 U.S. 263, 270 (1934), "The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution * * *. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined."

404 U.S. at 211-12.

To similar effect is *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), which, while marking a sea change in the test for federal admiralty jurisdiction, nonetheless reaffirmed the fundamental role of the States under our system of federalism. In holding that an airplane crash into Lake Erie was not cognizable in admiralty, the *Executive Jet* Court rejected the strict locality test under which jurisdiction turned on whether the tort occurred on the navigable waters, and added the nexus test which requires that the tort "bear a significant relationship to traditional maritime activity." 409 U.S. at 268. The Court quoted with approval *Victory Carriers*' recognition that federalism principles must inform the decision to exercise admiralty jurisdiction. *See id.* at 272-73. Because "the Ohio courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors," it was for Congress to decide whether there was a federal interest in having a uniform

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[6] As Professor Black explained, "the fundamental justification . . . for the existence of the separate federal admiralty jurisdiction" is "the national interest in federal judicial supervision of the concerns of maritime and fluvial shipping." *Admiralty Jurisdiction*, 50 Colum. L. Rev. at 273. Professor Black thus proposed that the federal admiralty jurisdiction "should conserve as far as possible the personnel and other resources of the federal judiciary by referring to the jurisdiction of the states, with the usual provision of supervisory federal review where appropriate, those controversies which can be handled as well or better by the state court." *Id.* at 273. *See also id.* at 277 ("The 'amphibious' tort—injury by a maritime to a non-maritime object—might furnish some difficulty, not because of any metaphysical constructions as to tort 'locality' but because there is a legitimate state interest in the safety of property ashore."). *Amici* submit that any jurisdictional difficulty presented by such "amphibious" torts is resolved by limiting federal admiralty jurisdiction to those cases in which there is a substantial federal interest in providing a uniform rule to govern the conduct at issue.

body of law governing these torts. *Id.* at 273-74 (footnotes omitted). In short, because there was no demonstrated federal maritime interest in applying uniform rules of decision to the tort, the suit was to be resolved in the state court under its rules of decision.

The Court's decision in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), marks no change in this course. In *Foremost*, the Court upheld the exercise of admiralty jurisdiction over a collision on navigable waters between two pleasure boats, rejecting a vigorous dissent which argued that in the absence of commercial activity, there was no substantial federal admiralty interest. *See generally* 457 U.S. at 674-77; *see also id.* at 677-86 (Powell, J., dissenting). There was, however, a demonstrated federal maritime interest in exercising jurisdiction over the case, as evidenced by both the long tradition of admiralty courts hearing disputes arising out of vessel collisions and the Rules of the Road, 33 U.S.C. § 2001 *et seq.*, the federal statutory scheme which governs the navigation of all vessels on the navigable waters. *Id.* at 674-76. As the *Foremost* court noted, the federal maritime interest

> can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . . The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Id. at 675 (footnote omitted).

While *Foremost* modified *Executive Jet*'s nexus test, it was consistent with the fundamental purpose of the admiralty jurisdiction—to provide a federal forum to protect the federal interest in the uniformity of maritime law. When, as here, there is no demonstrable federal maritime interest in providing uniform rules regulating the tortious conduct at issue, the exercise of admiralty jurisdiction is inappropriate. As the Court stated in *Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990), when the jurisdictional inquiry is divorced "from the purposes that support the exercise of jurisdiction, it *has* gone too far." Accordingly, "a case must implicate [a federal maritime] interest to give rise to [admiralty] jurisdiction." *Id.; accord Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S.Ct. 2071, 2074-75 (1991).

The foregoing cases demonstrate that the Court's creation of the nexus requirement was born out of the recognition that under our system of federalism, the States share responsibility with the federal government for regulating activities which arguably implicate maritime interests. If the nexus test's requirement that a tort bear a substantial relationship to traditional maritime activity is to prove faithful to the purpose of the admiralty jurisdiction, *see Sisson*, 497 U.S. at 364 n.2; *Exxon*, 111 S. Ct. at 2074, it is because there is a federal maritime interest in providing uniform rules in adjudicating these torts.

It is apparent that important consequences for both federal as well as state interests stem from a court's answering the question whether a tort bears a substantial relationship to traditional maritime activity. It is therefore regrettable that the resolution of this question has been characterized as being "subject to easy manipulation." 1 Benedict at § 171. Indeed, notwithstanding the Court's admonition in *Sisson* "that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose," 497 U.S. at 364, substantial confusion remains

over the precise level of generality at which the relevant activity should be defined.[7]

Sisson's rule may be appropriate where both plaintiff and defendant engage in traditional maritime activity because under such circumstances, it is likely to produce few aberrational results and impose only insubstantial costs on the federal-state balance. But where, as here, most of the parties involved are not maritime actors and jurisdiction is premised on the Admiralty Extension Act, a change in course is warranted.[8] Particularly because cases such as this one involve torts which "state law has traditionally governed" and "raise difficult questions concerning the extent to which state law would be displaced or pre-empted," *Victory Carriers*, 404 U.S. at 212, federal courts must be certain that the assertion of admiralty jurisdiction is consistent with its fundamental purpose. *See Sisson*, 497 U.S. at 364 n.2; *Exxon*, 111 S.Ct. at 2074-75. Accordingly, as *Foremost* teaches, a court should examine the complaint to identify "the conduct alleged to have caused" the tort and ask whether there is a substantial federal maritime interest in providing a uniform rule of decision for the tortious conduct at issue.[9]

[7] *Compare* Br. Am. Cur. Maritime Law Assoc. 6 (in 7th Cir.) (arguing that "[t]he general character of the activity is the anchoring or mooring of a commercial vessel in a navigational channel, or a commercial vessel performing work in a navigational channel") *with* Opp. Cert. Great Lakes 12 (arguing that pile driving is the relevant activity). *See also* 1 *Benedict* at § 171 (noting that while *Sisson* characterized the activity "as storage of a vessel at a marina . . . one could also have characterized the relevant activity as washing and drying clothes or more generally, as recreation").

[8] *Amici* note that *Sisson* itself recognized that "[d]ifferent issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not." 497 U.S. at 365 n.3. This is such a case. *See* Br. of City of Chicago at 22-28.

[9] In *Sisson*, the Court rejected a more particularized inquiry into the circumstances of the incident on the ground that a court "would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." 497 U.S. at 365. *Amici* respectfully submit that just as in *Foremost*, a court need not decide the merits of causation issues to resolve a jurisdictional challenge. *Amici* suggest that a court should examine the complaint to determine "the conduct alleged to have caused" the tort, *see Foremost*, 457 U.S. at 675, assume that conduct proximately caused the tort, and ask the fundamental question of whether that conduct implicates the need for a uniform federal rule. Where there is doubt as to the precise conduct which caused the incident, the court can, of course, defer consideration of a motion under Fed. R. Civ. P. 12(b)(1) until completion of discovery.

See 457 U.S. at 674-77, *see also* 1 *Benedict* at § 103. When, as here, this question must be answered in the negative, a federal admiralty court must decline jurisdiction.

II. TORTIOUS PILE DRIVING IS AN INHERENTLY LOCAL CONCERN WHICH DOES NOT REQUIRE UNIFORM RULES OF DECISION

Great Lakes has characterized the relevant activity in this case as pile driving which, it argues, is a traditional maritime activity. *See* Opp. Cert. 12; Br. Great Lakes 23-25 (in 7th Cir.). The case law does not show, however, that there is a substantial federal maritime interest in providing a uniform rule of decision to govern tortious pile driving which causes damage to other structures; on the contrary, this type of claim has long been a concern of state law. Moreover, the general absence of federal maritime regulation governing pile driving is further evidence that there is no substantial federal interest in providing uniform rules to govern tortious pile driving activity. For these reasons, federal admiralty jurisdiction does not exist over the tortious activity at issue in this case.

A. The Case Law Demonstrates That Tortious Pile Driving Is A Concern Of State Law And Not Of Federal Admiralty Law

Throughout this litigation, Great Lakes has maintained that pile driving is a traditional maritime activity.[10] *See*

[10] The City of Chicago maintains that the relevant activity in this case is the manner in which the tunnel was maintained prior

Opp. Cert. 12; *see also* Br. Great Lakes 23-25 (in 7th Cir.). Great Lakes asserts the existence of "a century of cases applying admiralty jurisdiction to the installation and repair of pilings in navigable bodies of water," Opp. Cert. 12, and that, for "almost one hundred years," pile driving "has been considered a traditional maritime activity within [the] admiralty jurisdiction." Br. Great Lakes 23 (in 7th Cir.).

The cases Great Lakes cites, however, fall well short of satisfying its burden[11] of showing that the activity of tortious pile driving requires uniform rules of decision and the jurisdiction of a federal admiralty court to administer them. To the contrary, the most these cases can be said to stand for is that vessels which engage in pile driving also engage in other functions, such as navigation and the employment of seamen, which require uniform rules of decision and thus have been traditional concerns of the admiralty courts. And given the Court's recognition that the protection of the riverbanks from damage caused by vessels is an inherently local concern, *see Packet Co.*, 105 U.S. at 562-63, the protection of other structures from the harms caused by tortious pile driving should not be treated differently.

For example, Great Lakes asserts that *Lawrence v. The Flatboat*, 84 F. 200 (S.D. Ala. 1897), *aff'd sub nom. Southern Log Cart & Supply Co. v. Lawrence*, 86 F. 907 (5th Cir. 1898), was a "tort claim involving a pile driver

to the flood. *See* Br. Chicago at 48-49. *Amici* fully agree and submit that the operation and maintenance of tunnels is an inherently local concern which does not require uniform rules of decision. Consequently, there is no admiralty jurisdiction over the subject matter of this case. The discussion that follows demonstrates that even if the Court accepts Great Lakes' characterization of the relevant activity, it does not provide a basis for admiralty jurisdiction.

[11] As the party seeking to invoke the jurisdiction of the admiralty court, Great Lakes bears the burden of establishing its propriety. *See* Fed. R. Civ. P. 8(a).

on a flatboat." Opp. Cert. at 12 n.2. *Lawrence*, however, did not involve a tort claim but an action to recover back wages through the assertion of a maritime lien against the vessel. *See* 86 F. at 907. Such an action is within the admiralty jurisdiction because it is a maritime contract, not a tort.[12] *See Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 192 (1871); *Morewood v. Enequist*, 64 U.S. (23 How.) 491, 494 (1860); *Martinez v. Matson S.S. Co.*, 97 F.2d 19, 20 (5th Cir. 1938). *Lawrence* thus provides no authority for the proposition that negligent pile driving is within the admiralty jurisdiction as a maritime tort.[13]

Nor does *In re P. Sanford Ross*, 196 F. 921 (E.D.N.Y. 1912), *rev'd*, 204 F. 248 (2d Cir. 1913), support the extension of admiralty jurisdiction to the tortious conduct at issue here. There, the tortious activities at issue—negligence in the maneuvering of the vessel and in failing to provide necessary equipment, causing the death of a seaman, *see id.*—are the type of claims and activities (navigation and seaworthiness) which have traditionally required uniform rules of decision. The case therefore pro-

[12] As Professor Black described maritime contract jurisprudence, "[t]he attempt to project some 'principle' is best left alone. There is about as much 'principle' as there is in a list of irregular verbs." *Admiralty Jurisdiction*, 50 Colum. L. Rev. at 264. Certainly, an area of case law which has produced decisions "so humorous that they deserve insertion in the laws of Gerolstein," *see Sisson*, 497 U.S. at 372 (Scalia, J., concurring) (quoting Hough, *Admiralty Jurisdiction—Of Late Years*, 37 Harv. L. Rev. 529, 534 (1924)), provides no support for the notion that pile driving is a traditional maritime activity such as to confer maritime tort jurisdiction. That admiralty courts have heard maritime contract cases involving vessels engaged in pile driving simply shows that such vessels can engage in other functions which require uniform rules of decision.

[13] To similar effect is Great Lakes' reliance on *The V-14813*, 65 F.2d 789 (5th Cir. 1933). This case, which involved a suit to recover for labor and materials used to repair a tug and barge which carried a pile driver, was properly within the admiralty jurisdiction under the well settled rule that a contract to repair a vessel is maritime. *See* 1 *Benedict* at § 187.

vides no support for Great Lakes' contention that negligent pile driving is itself a maritime tort which must be adjudicated by an admiralty court.

Similarly unavailing is Great Lakes' reliance on *In re New York Dock Co.*, 61 F.2d 777 (2d Cir. 1932). There again, the underlying tort was not negligent pile driving but a personal injury to a seaman which was apparently caused by the failure to provide a seaworthy vessel. *See* 61 F.2d at 777. Such actions have long been the province of the admiralty courts. *See, e.g., The Osceola*, 189 U.S. 158, 175-77 (1903); 1 Martin J. Norris, *The Law of Maritime Personal Injuries* §2:6 (4th ed. 1990).[14]

In contrast to the absence of any tradition of admiralty courts exercising jurisdiction over disputes involving damage to other structures caused by tortious pile driving, state courts have long heard disputes of this kind. *See* 7 Stuart M. Speiser, *et al., The American Law Of Torts* § 19:16 (1990) (collecting state court cases); 4 Thomas G. Shearman & Amasa A. Redfield, *A Treatise On The Law of Negligence* § 758 (1941 & Supp. 1970) ("Substantial property damage sustained by a landowner as the actual result of the concussion and vibration from pile-driving operations upon adjacent land are recoverable even though such operations are reasonable and necessary and the pile driving is conducted in a careful and workmanlike manner."). The numerous state court cases ad-

[14] In the Seventh Circuit, Great Lakes also relied on several cases involving dredges and scows to support the exercise of admiralty jurisdiction in this case. Br. Great Lakes 24-25 (in 7th Cir.). These cases plainly do not establish the existence of admiralty jurisdiction over tortious pile driving.

Likewise, *Philadelphia, Wilm. & Balt. Ry. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1860), does not support Great Lakes because the claim there involved an "impediment to navigation," which "has always been considered as coming within the category of maritime torts, having their remedy in the courts of admiralty." *Id.* at 216 (citation omitted); *see also Foremost*, 457 U.S. at 674-76. Of course, none of the plaintiffs in this case assert any claims involving navigation.

judicating these claims demonstrate that pile driving is a common construction activity. *See, e.g., Vern J. Oja & Assoc. v. Washington Park Towers, Inc.*, 569 P.2d 1141, 1142 (Wash. 1977) (condominium apartment building); *D'Albora v. Tulane Univ.*, 274 So.2d 825, 827 (La. App. 1973) (hotel); *Lowry Hill Properties, Inc. v. Ashbach Const. Co.*, 194 N.W.2d 767, 769-70 (Minn. 1971) (highway interchange); *Caporale v. C.W. Blakeslee and Sons, Inc.*, 175 A.2d 561, 562 (Conn. 1961) (concrete retaining wall and bridge abutment). Given the numerous state court decisions adjudicating claims of damage to adjacent structures caused by tortious pile driving, Great Lakes' attempt to transform this common construction tort into a "traditional maritime" one is particularly unavailing.[16]

Moreover, tortious pile driving claims are simply not "a matter of global concern requiring uniformity under general maritime law." *American Dredging*, 114 S.Ct. at 990. Rather, the tortious activity at issue is far removed from the maritime law's traditional concern of protecting the shipping industry and traders—who, in the ordinary course of their affairs, travel throughout the world—by providing a legal system which assures that the same conduct will have similar legal consequences throughout the world. *Uniformity In The Maritime Law*, 73 Penn. L. Rev. at 127. There is no reason why the tortious conduct at issue here should be governed by the same rule of decision as would be applied by a court in Rotterdam or Shanghai.

[15] *See also* W.A. Dawson, *Pile Driving* 2 (1981) ("Piled lakeside dwellings are some of the earliest forms of construction. Most classical and medieval riverside towns were built on timber piles and many of our ancient cathedrals are still standing on them. Piling was a recognized military skill . . . ."); Federal Highway Administration, U.S. Department of Transportation, *The Performance Of Pile Driving Systems: Inspection Manual* 1 (1986) ("Pile driving systems are a rather archaic part of construction technology. They consist of a heavy mass which pounds on a 'stick' until it ends up buried in the ground.").

Indeed, the very nature of pile driving operations suggests that it is not properly the subject of a uniform federal rule. As a leading text notes, "[t]he effect on surrounding strata due to the driving of piles is rarely uniform." A.C. Dean, *Piles and Pile Driving* 119 (1935).[16] That the harms caused by the conduct of pile driving operations are likely to vary from one locale to another suggests that regulation of this activity is an inherently local concern. *Cf. Morgan's Steamship*, 118 U.S. at 465 ("The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York."). Just as the protection of the river banks at issue in *Packet Co.*, the protection of structures from the harms caused by tortious pile driving "belongs . . . manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing-places, can be properly made." 105 U.S. at 563. Under such circumstances, the States should be free to tailor appropriate standards of liability to reflect local conditions. *Id.*; *see also Morgan's Steamship*, 118 U.S. at 465.

Moreover, in the absence of any claims of injury by other maritime interests, the initiation of tortious pile driving from onboard a vessel does not, by itself, transform the activity from common construction to a "traditionally maritime" one which presumptively requires uniform rules of decision to govern it. As several leading texts on the subject demonstrate, the driving of pilings in the marine environment can frequently be accomplished by equipment which does not require the use of a vessel. *See, e.g., Piles and Pile Driving* at 126-29 (discussing construction of piers through use of screw piling machines

[16] *See also id.* at 2-3 (noting that without proper "[g]eological information as to surface deposits" a "pile cannot properly be designed, and there is no certainty . . . that the point of the pile is safely within a firm stratum").

and electric capstans); *cf. id.* at 15 (showing cutting of piles by equipment placed on staging); *Pile Driving* at 17-19 (discussing development of crane-leader piling rigs and their use in "driving piles for marine structures over water"). Even if the pilings involved here could have been driven only from a vessel, certainly a pile driver located on the land or a fixed (non-floating) platform could well have caused the same damage. The location of Great Lakes' pile driver aboard a scow does not justify extending the admiralty jurisdiction to the tortious conduct at issue here.[17] *Cf. Executive Jet*, 409 U.S. at 257-58 ("It is hard to think of any reason why access to federal court should be allowed . . . merely because of the fortuity that a tort occurred on navigable waters, rather than on other waters or on land.") (quoting ALI Study of the Division of Jurisdiction Between State and Federal Courts at 233); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424-25 (1985) (rejecting welder's claim that he was engaged in "maritime employment" under the LHWCA, noting that the activity "is also performed on land"). The power of the States to prescribe appropriate rules of decision tailored to local conditions should not be dis-

[17] As several photographs in the Joint Appendix demonstrate, Great Lakes used the same type of crane-leader piling rig which is commonly used in land based pile driving operations. *Compare* J.A. 64, 68, *with Pile Driving* at 17-18. Indeed, it appears that Great Lakes' crane was not permanently affixed to the scow and could readily be moved on and off of it. *See* J.A. 64, 76.

Amici also note the Affidavit of Wayne S. Valley, a twenty-year employee of Great Lakes. *See* J.A. 69-74. Mr. Valley's affidavit recounts the various construction projects engaged in by the scow No. G.L. 136 and its pile driving rig, which included the replacement of failed docks, the construction of new docks, the construction of a fountain, and the installation of sheet piling walls. *Id.* at 72-73. *Amici* respectfully submit that Great Lakes' position, if taken to its logical conclusion, would require the federal courts to exercise admiralty jurisdiction over tort claims arising out of the faulty construction of such projects. Surely there is no substantial federal interest in providing uniform rules of decision for such torts.

placed by federal admiralty law solely because the tortious conduct was initiated on a vessel.

B. Pile Driving Is Not The Subject Of Federal Maritime Regulation

The general absence of federal maritime regulation governing the subject matter of pile driving is further evidence that there is no substantial federal maritime interest in providing uniform rules to govern tortious pile driving activity. The tort at issue here thus stands in stark contrast to the vessel collision in *Foremost*, which was governed by a federal statutory enactment that required uniform administration by the federal admiralty courts. *See* 457 U.S. at 676 (citing the Rules of the Road, 33 U.S.C. §§ 2001 *et seq.*).

As an initial matter, *amici* note that while Congress has instructed the Coast Guard to examine and license such varied categories of maritime personnel as masters, pilots, mates, operators, engineers, radio officers, able seamen, lifeboatmen and tankermen, *see* 46 U.S.C. §§ 7101(c), 7301 *et seq.*, it has prescribed no licensing requirement for pile driver operators. Nor does the Coast Guard examine in pile driving operations any category of the personnel it licenses or documents. *See* 46 C.F.R. § 10.910 (table listing examination topics for deck licenses); *id.* § 12.05-9 (examination of able seaman); *id.* § 12.20-5 (examination of tankerman). Moreover, while Congress has enacted an extensive body of statutory law pertaining to navigation and the navigable waters as well as shipping, *amici* are aware of no provision of these statutes which prescribes standards for the operation of pile driving as a distinct activity.[18] *See generally* Title 33 U.S.C., Title 46 U.S.C.

[18] Vessels engaged in pile driving are, of course, subject to a variety of statutes of general applicability such as the Refuse Act of 1899, 33 U.S.C. § 407, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, and the Rules of the Road, 33 U.S.C. §§ 2001 *et seq.* *Amici* also note that the Occupational Safety and Health Administration has promulgated "safety and health regulations for construction" activities, *see* 29 C.F.R. Pt. 1926, which include regulations pertaining to the safety of workers engaged in the operation of pile driving equipment. *See* 29 C.F.R. 1926.603. To the best of *amici*'s knowledge, neither Congress, nor any federal agency, has prescribed standards pertinent to the tortious conduct at issue in this case.

Amici also note that under federal law, vessels such as the G.L. 136, the barge on which the pile driver was located, *see* Pet. App. 28, are not required to be inspected. *See* 46 U.S.C. § 3301 (listing vessels subject to Coast Guard inspection).

The absence of any substantial federal maritime interest in regulating pile driving operations refutes Great Lakes' contention that admiralty jurisdiction exists over the tort at issue here. The exercise of state court jurisdiction cannot pose a threat to the federal interest in the uniform development of admiralty law when there is no evidence of a substantial federal maritime interest in regulating the activity. Under these circumstances, there is no valid reason for the admiralty jurisdiction to displace state forums and rules of decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 22, 1994